

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 14-CV-704-GKF-JFJ
)	
OSAGE WIND, LLC;)	
ENEL KANSAS, LLC; and)	
ENEL GREEN POWER NORTH)	
AMERICA, INC.,)	
)	
Defendants.)	

**DEFENDANTS' SUPPLEMENTAL BRIEF ON THE SCOPE AND
MEANING OF THE TENTH CIRCUIT'S OPINION**

Defendants, Osage Wind, LLC, Enel Kansas, LLC, and Enel Green Power North America, Inc. (collectively, "Defendants") respectfully submit this supplemental brief on the scope and meaning of *United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017) (the "Tenth Circuit's Opinion").

Currently pending before the Court are the United States' Substituted Motion for Leave to Filed Second Amended Complaint (Dkt. # 103) and the Osage Minerals Council's Motion to Intervene (Dkt. # 104).¹ The briefing on those motions closed on February 3, 2020 and February 17, 2020, respectively.² A key issue disputed by the Parties in the briefing on those motions is the scope and meaning of the Tenth Circuit's Opinion. The Defendants, on the one hand, have advocated that the Tenth Circuit's Opinion "contemplates a straightforward determination of the

¹ Also pending are the United States' Motion to Strike the Defendants' Answer (Dkt. # 102) and the Defendants' Motion for Judgment on the Pleadings (Dkt. # 119).

² The briefing on the motions referred to in Note 1, *supra*, closed on February 10, 2020 and March 6, 2020, respectively.

money damages at issue, which should be limited to the value of the rock that was sorted, crushed, and exploited into structural support.” (Dkt. # 116, at 18, 20-23; *see also* Dkt. # 118, at 4, 16-18).

The United States, on the other hand, has advocated for a much broader reading of the Tenth Circuit’s opinion—claiming that it supports the contention that the entire Project is unlawful and in manner in which it encounters the Osage Mineral Estate is unlawful, entitling it to pursue removal of the Project and disgorgement of the entire Project’s revenues, among other extraordinary relief. (Dkt. # 118, at 4-5; Dkt. # 103, at 17, ¶¶ 7-8; Dkt. # 121, at 6 (asserting that the Tenth Circuit’s Opinion stands for the proposition that the Project is an “inva[sion]” and “occup[ation]” of the Osage Mineral Estate; *see also* Dkt. # 125, at 20 (stating to Magistrate Judge Jayne that the entirety of the Defendants’ activities amounted to “invading the Osage Minerals mineral estate.”)).³

In a brief filed on March 18, 2020 (after the briefing had closed in all of the above-described motions), the United States filed a response to a motion for summary judgment in *Rosebud Sioux Tribe, et al. v. Donald J. Trump, et al.*, United States District Court for the District of Montana Case No. CV-118-GF-BMM. A copy of that brief, without exhibits, is attached hereto as Exhibit A. On pages 19-21 of that brief, the United States advocates a much narrower reading of the Tenth Circuit’s Opinion in this case than it is advocating here. (Exh. A, at 19-21). In fact, the position of the United States there is very similar to that the Defendants are advocating here. In determining the proper scope and meaning of the Tenth Circuit’s decision in *United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017), the Defendants respectfully submit that the Court should consider the United States’ interpretation of the Tenth Circuit’s Opinion as advanced in *Rosebud Sioux Tribe*.

³ The OMC follows suit. (Dkt. # 127, at 7-10).

Respectfully submitted,

/s/ Ryan A. Ray

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2020, I electronically transmitted the attached Document to the Clerk of the Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of the Court will transmit a notice of Electronic Filing to the following ECF registrants:

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